No. 944

In the Supreme Court of the United States

October Term, 1944

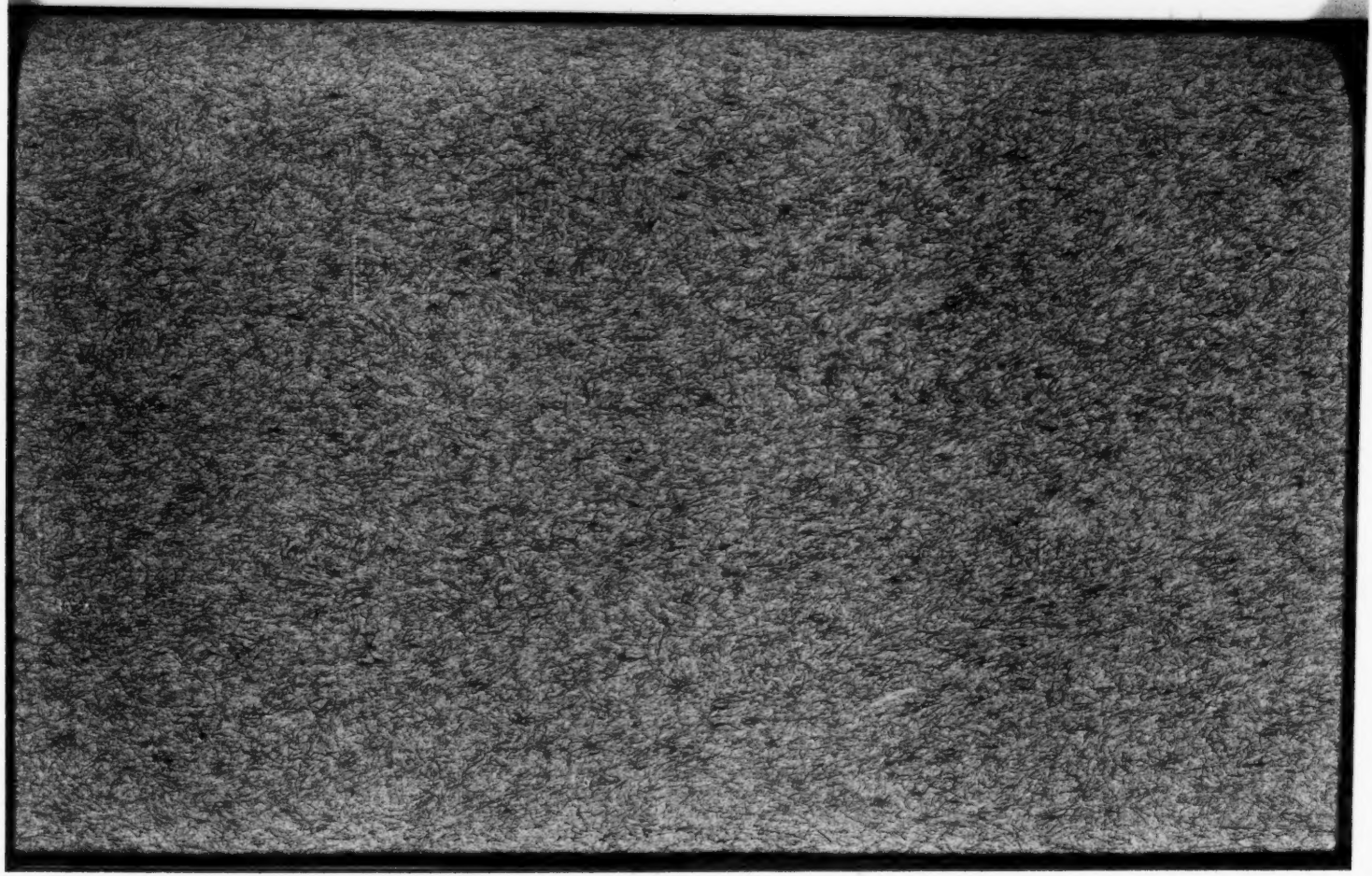
JOHN WILLARD THOMPSON AND ARMY THOMAS CARTER, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 943

JOHN WILLARD THOMPSON AND ANGY THOMAS CASTEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 65–67) is reported at 145 F. 2d 826.

JURISDICTION

The judgment of the circuit court of appeals was entered December 9, 1944 (R. 67), and a petition for rehearing (R. 69–71) was denied January 13, 1945 (R. 72). The petition for a writ of certiorari was filed February 12, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain petitioners' convictions on the charge that they received and concealed certain property stolen from an interstate shipment which they knew had been stolen.

2. Whether the trial court, in charging the jury, committed reversible error.

STATUTES INVOLVED

The Act of February 13, 1913, 37 Stat. 670, as amended by the Act of January 28, 1925, 43 Stat. 793 (18 U. S. C. 409), in part provides:

> * * * whoever shall steal or unlawfully take, carry away, or conceal * * * from any * * * truck, or other vehicle * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *. The words * * * "truck," "or other vehicle," as used in this section shall include any * * * truck, or other vehicle of

> any person, firm, association, or corporation having in his or its custody therein or thereon any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On January 24, 1944, petitioners, together with James Duane Smith, James Harold Coffee, Mae Hatch, Houston Willis Perry, and Tommie Garner, were indicted in the District Court of the United States for the Northern District of Texas in two counts, the first of which charged a violation of the Act of February 13, 1913, as amended, in that they received and concealed certain whiskey which had theretofore been stolen from an interstate shipment of freight, knowing it to have been stolen; and the second count charged that the defendants conspired to receive and conceal goods stolen from an interstate shipment of

freight, in violation of Section 37 of the Criminal Code (R. 2–6). Defendants Smith, Coffee, Hatch, and Perry pleaded guilty to the first count (R. 21), while petitioners and defendant Garner, having pleaded not guilty to both counts (R. 21), were convicted by the jury upon each (R. 7). Petitioners were each sentenced generally to five years' imprisonment (R. 15–17). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 65–67).

The evidence adduced by the Government in support of the indictment is, in summary, as follows:

On Sunday, November 14, 1943, at about 8:15 p. m., a trailer truck loaded with about 500 cases of whiskey, en route from a distillery in Illinois to a consignee in Albuquerque, New Mexico, was stolen from in front of the premises of Miller & Miller Truck Freight Lines, in Dallas, Texas (R. 22–23).

At about 1:30 a. m. on Monday, November 15, 1943, defendant Hatch, upon arriving at her home, found defendant Smith in her yard engaged in unloading upon the ground cases of "Old Rocking Chair" whiskey from a trailer attached to a truck. Smith told Hatch not to say anything, and that he had to "get rid of the truck." Later Smith drove the truck away, followed by Hatch in her car, "out the Garland Highway * * * turned off on a road to the left," and abandoned

the truck. Hatch then drove Smith in her car to a point in Dallas where Smith's car was parked, and left Smith there. (R. 23.) At this time Smith stated to Hatch that he would return with others to move the whiskey into Hatch's house (R. 26).

At about 3 o'clock that morning, Smith and the two petitioners appeared at Hatch's home, and petitioners moved the cases of whiskey into the house; the whiskey "about filled up the house" (R. 24, 26–27). This operation consumed from two to three hours and was carried on without any lights in the yard or in the room to which the whiskey was carried, although there were lights in other parts of the house. Smith and both petitioners left Hatch's premises at about 6 a. m. Smith told Hatch "not to say anything," and that "the other two boys [petitioners] would not say anything." Hatch knew that the whiskey was "hot," was "rather scared," and made preparations to "move into town." (R. 24, 26.)

The empty truck was found during the day of November 15 off of the highway "this side of Garland" (R. 22). Almost all of the stolen whiskey was recovered about two weeks later (R. 22–22).

According to the testimony of an agent of the Federal Bureau of Investigation, petitioner Casten informed him, subsequent to the foregoing incidents but prior to the trial in this case, that

some time between midnight of November 14–15, 1943, and daybreak, Casten was awakened by an individual whose identity Casten refused to reveal, who told Casten that he knew the location of two or three hundred cases of whiskey and that "it would be an opportunity to steal them" (R. 41–42). On that or another occasion Casten also stated to the same agent that there "was a lot involved in this case" and that he "had no kick coming" (R. 43).

Petitioners did not testify, nor did they offer any evidence in their own behalf.

ARGUMENT

1. Petitioners contend (Pet. 3, 11, 12–18), in essence, that the evidence did not sufficiently establish that they knew the whiskey was stolen. We submit that when the evidence relating to petitioners is viewed in the light of the inferences which may properly be drawn from it, its sufficiency to support their convictions under count 1 is clear.[1]

The undisputed evidence summarized in the Statement, *supra*, pp. 4–6, shows that the whiskey in question was stolen from an interstate ship-

[1] Since petitioners were each sentenced generally to imprisonment for a term of five years (*supra*, p. 4), and since those sentences are within the maximum permitted under 18 U. S. C. 409, upon which count 1 is predicated, it is unnecessary to consider the validity of the convictions under count 2, the conspiracy count. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

ment on Sunday evening, November 14, 1943; that defendant Smith was a party to the crime; that he brought the stolen truck with its contents to defendant Hatch's home; and that after unloading the whiskey in her yard he told her that he would return with other persons who would aid him in moving the whiskey into her house. Within a few hours after the whiskey had been stolen, at about 3:00 a. m. on Monday, November 15, 1943, Smith returned with petitioners. During the period from 3:00 to 6:00 a. m., petitioners removed the whiskey to the house; they worked in the dark while in the yard and while placing the whiskey in a bedroom in the house. In addition to the proof as to the events at the scene where the whiskey was concealed, petitioner Casten admitted to an F. B. I. agent that during the night in question he was awakened by an individual whose identity he would not reveal, who told him of an opportunity to steal several hundred cases of whiskey. As the court below put it (R. 67):

> The brief lapse of time between the separation of Mrs. Hatch and Smith and his reappearance at her home with the appellants suggests the likelihood of some prearrangement with them, as did his statement to her that he would bring some men to help him move the whiskey. The possession of so huge a quantity of whiskey of the same brand, and its surreptitious concealment in

> the early morning hours without benefit of lights, was fraught with suspicious implications.
>
> The only reasonable inference from these unexplained actions, considered as a whole and in their relation to each other, was that the appellants knew the whiskey had been stolen at the time they took possession of it.[2]

Even if it be assumed, *arguendo*, that petitioners did not have possession of the whiskey, it is clear that the defendant Smith did have such possession and that petitioners aided and abetted him in concealing it. Accordingly, under 18 U. S. C. 550, they were guilty as principals.

2. Petitioners assert for the first time (Pet. 20–24) that the trial court failed to charge the jury that they were required to find that petitioners knew the whiskey had been stolen. Reference to the text of the court's charge shows that this contention is without substance.

The indictment, which alleged such knowledge, had been read to the jury (R. 57). Thereafter, in charging the jury, the court summarized its

[2] While it was necessary that the Government prove that petitioners knew the whiskey was stolen, the Government was not required to prove that petitioners knew it had been stolen from an interstate shipment. *Friedman* v. *United States*, 233 Fed. 429 (C. C. A. 1), writ of error dismissed, 244 U. S. 643; *Bloch* v. *United States*, 261 Fed. 321, 325 (C. C. A. 5), certiorari denied, 253 U. S. 484; *Rosen* v. *United States*, 271 Fed. 651 (C. C. A. 2); *Thomas* v. *United States*, 11 F. 2d 27 (C. C. A. 4).

contents, stating that the defendants were charged with unlawfuly, wilfully, knowingly and feloniously receiving and concealing some 500 cases of whiskey which was being transported in interstate commerce, "as alleged in the indictment." The court then summarized the conspiracy count as charging that the defendants knowingly conspired to receive and conceal stolen goods taken in interstate commerce and instructed the jury that since petitioners had pleaded not guilty, they had put at issue the charges of the indictment and that it was the jury's duty to determine those fact issues. (R. 54.) After giving the usual instructions on the weight to be accorded the testimony of accomplices, the effect of petitioners' failure to testify, and on the elements of the conspiracy charge, the court concluded as follows (R. 59):

> So now, gentlemen, in the light of these instructions, if you believe that on or about the time stated in the indictment that these defendants who have entered their pleas of not guilty did, as charged in the indictment, conceal the whiskey set forth in such charge, as therein presented, and you believe and find such to be true from the evidence beyond a reasonable doubt, it would be your duty to convict the said defendants. If you have a reasonable doubt, you will acquit them.

At the conclusion of the charge the court afforded petitioners an opportunity to request ad-

ditional instructions and they did request some. They did not, however, request an additional charge on the point they now urge or indicate to the court that the charge was deficient in this respect. (R. 60–61.) We recognize that the instruction complained of is not a model one, but we think it clear that from the indictment, the evidence, and the charge as a whole, the jury understood that the property involved was allegedly stolen property and that petitioners were charged with having received and concealed it, knowing it to have been stolen. In these circumstances, the present contention having been raised for the first time in this Court, we submit that it does not merit review.

3. Petitioners challenge (Pet. 18–20) to the trial court's instruction concerning the weight and effect of circumstantial evidence on the ground that it was confusing, is meritless. The court instructed the jury on the point as follows (R. 55):

> In some portions of the case, the government relies upon circumstantial evidence, and particularly is that true with reference to the second count of the conspiracy.
>
> On the subject of circumstantial evidence, the Court will give you this charge:
>
> In order to convict the defendants upon circumstantial evidence, it is necessary not only to prove that all the circumstances concur to show that he committed the crime

> charged, but that those circumstances are inconsistent with any other reasonable conclusions than that of his guilt. It is not sufficient to entitle the prosecution to a conviction that the circumstances coincide with, account for, and render probable the hypothesis of guilt sought to be established by the prosecution, but those circumstances must exclude to a moral certainty every other hypothesis but the single one of guilt of the defendants, or the jury must find the defendant not guilty.

At the conclusion of the charge (R. 60), counsel for petitioners objected to the portion quoted above on the ground that "* * * it may leave the impression that the Court thinks, or is charging the jury, that the first count in the indictment does not raise to any degree or take any essential proof upon circumstantial evidence, and we think that the circumstantial evidence feature must necessarily enter into both counts of the indictment." The court thereupon supplemented the instruction as follows (R. 61):

> The charge is oral, and I think I told you in this charge, and if you do not so understand I tell you now that the government relies in part upon circumstantial evidence for a conviction in this case; and particularly does it rely on such in the second count.

Following this statement by the court, petitioners made no objection and sought no further clarification (R. 61).

CONCLUSION

This case does not present any question of law of general importance, nor is there any conflict with decisions of other circuit courts of appeals or of this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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